AMERICAN BAR

STANDING COMMITTEE **Law and National Security**

INTELLIGENCE REPORT

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Senate Debates S.391, Agents' Protection Act

Your editors had hoped that by the time this issue of *Intelligence Report* went to press we would be able to tell our readers that S.391 had been approved by the Senate, with or without amendments offered from the floor. Unfortunately, there were successive delays in bringing the bill to the floor of the Senate.

The January issue of *Intelligence Report* contained an account of the status of S.391, the Intelligence Identities Protection Act. The bill (H.R. 4) had already passed the House and was awaiting floor action in the Senate in the waning days of the first session. It became apparent that there was disagreement as to the form of the bill as reported out by the Senate Judiciary Committee and that a floor fight with the possibility of a filibuster was brewing. So the bill was never debated and never came to a vote before the Christmas/New Year recess.

At the beginning of the second session, President Reagan entered the fray and wrote the Senate majority and minority leaders (and other senators), urging early action. His letter summed up his views in these words:

> Last September the House of Representatives overwhelmingly passed the administration-supported version of the Intelligence Identities Protection Act. The Senate is soon to take up consideration of this legislation, and you will have before you two versions. While I believe that both versions are fully protective of constitutional guarantees, Attorney General Smith and I firmly believe that the original version, first introduced by Senator Chafee and others, is far more likely to result in an effective law that could lead to successful prosecution.
>
> I strongly urge you and each of your colleagues to support the carefully-crafted Chafee-Jackson amendment to S.391. I cannot overemphasize the importance of this legislation.

President Reagan's letter was similar in tenor and thrust to that of the Senate Intelligence Committee, which on November 18, 1981, was addressed to Senator Baker and signed by all 15 members, urging the majority leader to bring the Intelligence Identities Protection Act to the floor.

Finally, on Thursday, February 25, S.391 was called up at 4 p.m. There was extensive debate on that day, followed by some six hours of debate on Monday, March 1. It is understood that the debate is to be resumed on Tuesday, March 9, and the outlook is that the vote will take place sometime that week or early the following week. (By the time you receive this issue of *Intelligence Report*, the Senate probably will have voted.)

The single most significant fact that emerges from the debate to date is that there is *absolute unanimity* in the Senate on the need for legislation designed to accomplish the purpose of the Intelligence Identities Protection Act, in order to protect our intelligence community against elements like Philip Agee and Louis Wolf.

A number of the senators who spoke stressed the

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FLASH

As this issue is about to be put on the press, we have received the news that H.R. 4, with Senator Chafee's amendment, has passed the Senate by a vote of 90 to 6. There will be more in our next issue.

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damage that had already been done. Senator Chafee noted that over the past five years over 2,000 names of alleged CIA officers have been published by a small group of individuals whose declared purpose it is to expose and undermine U. S. intelligence operations. Senator Goldwater (R-Ariz.) pointed out that last November alone the *Covert Action Information Bulletin* published the names of 69 alleged CIA officers serving abroad in 45 countries. "One week later," said Senator Goldwater, "the pro-Sandinist paper, *Nuevo Diario*, identified the names of 13 alleged CIA officers assigned to the U. S. embassy in Managua, Nicaragua. Several of those named have already received death threats, been roughed up in their homes at night, and the families of a number of these American officials have been evacuated for their personal safety. U. S. officials in Managua have linked the publication of these names with the visit of Philip Agee to Nicaragua last month."

Senator Denton (R-Ala.), chairman of the Senate Subcommittee on Security and Terrorism, said in his opening speech:

> It seems mind-boggling to me that no existing law clearly and specifically makes the unauthorized disclosure of clandestine intelligence agents' identities a criminal offense. Therefore, as matters now stand, the impunity with which unauthorized disclosures of intelligence identities can be made implies a governmental position of neutrality in the matter. It suggests that the U. S. intelligence officers are "fair game" for those members of their own society who take issue with the existence of a CIA or find other perverse motives for making these unauthorized disclosures.

The only division within the Judiciary Committee and within the Senate revolved around one phrase in section 601(c), which has to do with persons *outside the government* who identify American covert agents. The version of the bill passed by the U. S. House of Representatives last September, H.R. 4, was worded as follows:

> Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with *reason to believe* (emphasis added) that such activities would impair or impede the foreign intelligence activities of the United States, etc.

This same wording had been used in the bill which was approved by the Senate Intelligence Committee in the previous session of Congress, with the very strong support of the Carter Justice Department. In the course of S.391's consideration by the Senate Judiciary Committee, Senator Biden (D-Del.) offered an amendment substituting the words *with intent to impair or impede* for the words *with reason to believe that such activities would impair or impede*. The amendment won out by a vote of 9 to 8 in committee.

Some of the principal sponsors of the legislation, in particular Senator Chafee (R-R.I.) and Senator Jackson (D-Wash.), immediately let it be known that they would seek to reverse the Biden language when the bill reached the floor, to make it conform with the bill which had already passed the House. During the course of the debate on February 25, the amendment was formally introduced, with 24 co-sponsors joining Chafee and Jackson.

Senators Biden and Bradley (D-N.J.), who were the principal spokesmen for the Biden language, were emphatic on the point that they strongly supported the general purpose of the legislation. Biden spoke about "these guys who are the bad guys we all want to get" and argued insistently that his language would be more effective in putting them away than the language of the Chafee amendment. Senator Bradley said, "This bill is responsive to a grave problem the U. S. intelligence community faces in fulfilling its foreign intelligence responsibilities. In recent years a small number of Americans, including some former CIA employees, have been engaged in a systematic effort to undermine our clandestine intelligence operations by disclosing the names of agents. Yet so far, none of the people responsible for these disclosures has been indicted under the espionage laws or any other law."

The debate that followed the introduction of S.391 demonstrated once again that lawyers can differ as much among themselves on the interpretation of the laws and the Constitution as theologians can differ over the interpretation of the scriptures.

The Question of Constitutionality

Senators Biden and Bradley and their supporters argued hard that the Chafee amendment would make the legislation unconstitutional and that a finding of unconstitutionality would set the purpose of the legislation back by years. Senator Biden said that the language of the Chafee amendment was unconstitutional in the opinion of over 100 constitutional scholars. This referred to a statement that had been printed in the *Congressional Record* of September 25, 1980, over the signatures of 100 law professors. On this point Biden was challenged by Senator Chafee who read the following paragraph from the statement signed by the 100 professors:

> We believe that sections 601(c) of S.391 and 501(c) of H.R. 4, which would punish

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Law of the Sea: "Spinach" or . . .?

By Your Editor

For the eleventh time, during March and April, the United States will sit down in plenipotentiary session with representatives of over 150 other nations to try and reach agreement on an acceptable treaty for the use of the world's oceans. There probably could be no negotiation which more aptly falls within the ambit of this American Bar Association committee's title, Law and National Security, than the upcoming Third United Nations Conference on the Law of the Sea.

Vital questions of national security such as freedom of straits passage and definition of territorial seas are involved as well as the international law (in effect, new constitution) which would govern deep seabed mining, should the treaty come into force. And the deep seabed mining issue is itself related to national security, since the potential for manganese, copper, cobalt and nickel at the bottom of the sea represents our anchor to windward for supply of these minerals, critical to defense production.

Why are we now moving into the *eleventh* negotiating session? Especially since at the end of the ninth session, our chief of delegation, Ambassador Elliot Richardson, declared:

> Historians are likely to look at the Ninth Session of the Third UN Conference on the Law of the Sea, just concluding here in Geneva today, as the most significant single event in the history of peaceful cooperation and the development of the rule of law since the founding of the United Nations itself. It is now all but certain that the text of convention on the Law of the Sea will be ready for signature in 1981.

What happened to that optimistic "all but certain" estimate? An American election in 1980, in which one of the candidates, Governor Reagan, expressed grave doubts about the provisions of the existing draft of the Law of the Sea Treaty. So grave, in fact, that he appointed a task force to advise him in the premises. Both your editor and the educational consultant to the ABA Committee on Law and National Security, Frank Barnett, were members of the task force. It was the conclusion of that task force (comprised of 24 members from academe, retired naval officers, and from user and mining industries) that the draft which came out of the ninth session—so fulsomely praised by Ambassador Richardson—should be put on "hold" until the Reagan administration could review its provisions.

President Reagan, after consulting his advisors in the new administration, acted before the tenth session convened by relieving the previous negotiating team and appointing a new one headed by Ambassador James Malone. He then appointed an interagency task force to review the treaty draft and, in effect, tread water (with observers only) during the tenth negotiating session.

To understand the complexities of a multilateral treaty which is comprised of 17 parts, 320 articles, and eight annexes, it is necessary to set forth two contrasting heuristic models—a device used by Professor John Norton Moore, a member of the Committee on Law and National Security, and a former U. S. Ambassador to the Law of the Sea Conference (1973-76), to stimulate "interest as a means of furthering investigation."

For the purpose of this discussion, such heuristic models were best set forth by Ambassador Malone himself in a speech given to the American Enterprise Institute for Public Policy Research on October 19, 1981, while his team was in the midst of reviewing the treaty. The first model expresses the views of those who believe a satisfactory treaty *cannot* be agreed upon:

> There are those who feel that a realistic assessment of the progress of the conference to date makes it highly unlikely that despite best efforts on both sides it will be possible to conform this treaty to all U. S. objectives. To be true to their perception of the administration's goals and philosophy generally, it would be necessary to transform the draft treaty into a document which fosters the development of mineral resources, avoids monopolization by the Enterprise, establishes a system of political governance commensurate with our perception of our role in world affairs, avoids unjustifiable regulatory interference in mineral development, allows free market principles to operate and is incapable of being amended without U. S. consent. In their judgment, the treaty is 180 degrees away from these objectives.
>
> On the other hand, at the recently concluded meeting in Geneva, virtually all delegations cautioned the U. S. against attempting to modify the compromises which had already been agreed to by prior American delegations. If we were to follow that advice scrupulously, it is clear that none of the objectives I have just enunciated would be achieved and we would be once again in a position of being confronted with a treaty which stands little prospect of U. S. ratification. If we fail to follow that advice, we are told the conference will adopt the treaty in its present form and open it for signatures.

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Law of the Sea

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The second model expresses Ambassador Malone's hope that our negotiating team *can* achieve changes whereby in his judgment:

> . . . mankind would be better served if the convention were altered so as to create an attractive prospect for American participation.

His hopes were expressed in the second model:

> In my judgment, there is clearly an opportunity at this juncture to make improvements to the draft convention. I have some feel for what those improvements may be on the basis of my extensive consultations at the conference and with conference leaders and leading delegations in between the two sessions which occurred this year. I am confident that in all of our areas of concern some improvements can be made. What is not certain yet is whether those improvements taken as a package would be sufficient for our objectives and produce enough support for the convention in the U. S. The U. S. does not wish to be put in the position of misleading the conference by attempting a serious negotiation and then finding that we cannot deliver the final result.

There you have it! We seem to stand somewhere between the devil and the deep blue sea!

But the American delegation, after extensive study, has a pretty clear idea why the present draft of the treaty is fundamentally defective. It believes it:

- artificially limits deep seabed mineral production and provides for discretion and discrimination if there is competition for limited production allocations;
- discourages private investment in deep seabed mineral production because of lack of certainty in the granting of mining contracts, mandatory technology transfer requirements, and burdensome financial requirements;
- creates a privileged supranational competitor—the Enterprise—whose advantages could make it extremely difficult, if not impossible, for private ventures—absent national subsidies—to compete. A supranational monopoly over deep seabed mineral production could thus result;
- fails to provide grandfather rights for existing investment in deep seabed mineral development;
- establishes a decision-making system so structured that U. S. and other potential deep seabed mineral producers and consumers will be unable effectively to influence important policy and operational decisions;
- provides for a review conference which, after five years of negotiation, may adopt amendments to the deep seabed mining regime that would automatically enter into force for the U. S. upon approval by two-thirds of the States Parties;
- allows participation by and funding for liberation groups.

Again, there are those who think it's not worth a try to negotiate further. The nationally syndicated columnist, Jack Kilpatrick, thinks President Reagan, instead of ordering Ambassador Malone back to the negotiating table, might have said:

> I say it's spinach—and I say the hell with it.

He goes on to opine that:

> If Lewis Carroll had written Alice in the Sea Bed, he could not have contrived a more preposterous scenario.

The well-known political theorist and constitutional lawyer, Walter Berns, now a resident scholar at the American Enterprise Institute, listened to the heuristic models set forth by Ambassador Malone, as well as to all the earlier speakers on the Law of the Sea Treaty, and concluded in a subsequent article:

> There is little danger that the United States will sign the present treaty and, if the administration does sign it, scarcely any possibility that it will be approved by the constitutionally required two-thirds vote of the Senate.

That language is not quite as colorful as, "It's spinach and to hell with it," but it carries the same message. It must be said, however, that both journalist Kilpatrick and scholar Berns are beating a dead horse—the treaty that emerged from the ninth session and was rejected by President Reagan. The point is that Ambassador Malone has been ordered to go back and try to give birth to a new horse which could be ridden by all 150-plus nations. Forget the old nag!

It is the *president* who conducts the foreign policy of the United States. With one eye on the Senate, he has sent Ambassador Malone back to the UN to try and reach an agreement. If he does not succeed in correcting the seven fundamental defects listed above, it is doubtful the United States will sign, since those defects contain certain "treaty stoppers" which would make a two-thirds ratification vote in the Senate extremely doubtful.

The Group of 77, on the record at least, has indicated that the time for compromise on *fundamental* issues has passed—that, indeed, it has already com-

promised to get the treaty where it is today. Thus, Ambassador Malone is faced with the difficult task of negotiation *de novo* on critical issues.

Despite the hard line taken by the Group of 77, we can only hope that all parties will embark upon the upcoming negotiations with good will and with a constructive resolve to find a solution. If the negotiations are conducted in this spirit, hopefully a treaty worthy of ratification by the United States Senate will yet emerge.

What is certain is that any "law of the sea" treaty that does not have the participation of the United States would be of highly questionable effectiveness.

Judge Buergenthal Speaks On Helsinki Accords Today

Judge Thomas Buergenthal of the Inter-American Court of Human Rights was the featured speaker at a breakfast sponsored by the American Bar Association's Standing Committee on Law and National Security held at the Philadelphia Centre Hotel on January 8 during the annual meeting of the Association of American Law Schools. The Judge, who is the author of *International Law, Human Rights and the Helsinki Accords*, spoke on "The Helsinki Accords Today." Stressing the importance of the Accords, which were signed by the United States, Canada and 33 European nations including the Holy See (but not Albania), Judge Buergenthal pointed out that, although the Accords are not a legally binding agreement, they may be more important than a treaty since the signatories stated that they must comply with the Universal Declaration of Human Rights. This means that a signatory state now has the right to place on a *political*, if not on a judicial agenda, violations of the Declaration and of the Accords by other signatories such as has been done with regard to Poland, for example, at the Conference on Security and Co-operation in Europe currently meeting in Madrid.

Judge Buergenthal noted that in reality compliance with an international agreement does not necessarily jibe with whether the pertinent international instrument is binding or non-binding. In other words the *need* to comply, in the face of awakened political forces, may be more significant than the *obligation* to comply.

Answering questions, the Judge stated that the language of the Helsinki Accords does not support the contention that the Brezhnev Doctrine was accepted in those Accords. An answer of special interest was the Judge's description of the first case decided by the Inter-American Court of Human Rights in December 1981 at its seat in San Jose, Costa Rica. Presiding at the breakfast was George Haimbaugh, Chairman of the Advisory Committee to the Standing Committee on Law and National Security.

George Haimbaugh

Proposed Executive Order on Classification of Federal Records

Representatives of the Standing Committee on Law and National Security were briefed on February 11 by Mr. Steven Garfinkle, Director, Information Security Oversight Office, General Services Administration, on the proposed executive order which would make changes in the classification and declassification of federal records. GSA, under whose jurisdiction the U. S. Archives fall, has the proponency for the federal government.

The proposed executive order would retain the three classifications of top secret, secret, and confidential, but would modify the present rule so that, in case of doubt, documents would be classified. The other highlights of the proposed executive order are set out below.

—The number of persons authorized to classify documents would remain approximately the same.

—It would increase by three, although this is largely clarification, the number of categories of information subject to classification.

—It would authorize continuation of original classification as long as required by the national security interest.

—It would provide that classification may not be used to conceal violations of law, inefficiency or error, prevent embarrassment, restrain competition, or delay release of information.

—It would authorize appeals of classification to the National Security Council through Mr. Garfinkle's office.

Although the proposed changes are, according to Mr. Garfinkle, in reality not great, opposition has already arisen from various quarters, including the Society of Professional Journalists and Morton Halperin of the Center for National Security Studies. In addition, the chairmen of eight House committees and subcommittees have asked Mr. William Clark, national security adviser, not to rush ahead until they have had a chance to study the proposed changes and been given time to allow a thorough review. Rep. Glenn English (D-Okla.), chairman of the House Government Information Subcommittee, has scheduled hearings this month.

Larry Williams

ABA House of Delegates Endorses Moon Treaty

At a conference in New York City, sponsored by the Council on Economics and National Security, ex-astronaut Senator Jack Schmitt (R-N.M.), the only geologist ever to land on the moon, stated somewhat wistfully:

> . . . by going to the moon I got thrust right back into the middle of economic geology, and if any of you has access to about $20 billion worth of capital that you can stand to invest for the next 20 years, I think I have a great titanium property for you. The soils of the Valley of Taurus-Littrow contain 10 to 13 weight percent TiO_2 in the form of ilmenite, and I have a feeling that, with about that amount of capital and faith and risk-taking potential, we could develop quite a property up there; not only would it have pre-mined ilmenite for separation and refining, but a very easy transportation problem getting it back to earth. You realize now the moon has only one-sixth of the earth's gravity and, with a little bit of a push and a little bit of guidance, you get that out of the lunar influence and it will fall right back into this gravity well that we call the earth. So there are many ways to skin a cat, and the titanium cat, at least, might be skinned by this kind of investment. I want all of you to think about that and let me know because I do hold, at least in my own mind, the right to that particular property.

Senator Schmitt's statement becomes all the more significant when considered in the light of the action of the ABA House of Delegates on the Moon Treaty reproduced below.

> BE IT RESOLVED that the American Bar Association urges that United States policy in the development of international law regarding activities in outer space should be based on the following principles:
>
> That the content of international law governing the peaceful uses of outer space, including the Moon and other celestial bodies, is a matter of substantial importance to the national interests of the United States;
>
> That the United States should preserve its rights under existing international law to undertake national exploration and use of outer space, including the unilateral right to undertake both scientific exploration and commercial development and use of natural resources found in outer space; and
>
> That encouragement of voluntary international cooperation in outer space, arms control constraints on the use of outer space consistent with the security of the United States, protection of the environment in outer space, and safeguarding of life and health of persons in outer space, are legitimate interests of the United States and of the international community.
>
> BE IT ALSO RESOLVED, therefore, that the American Bar Association favors the signature and ratification by the United States of the "Agreement Governing the Activities of States on the Moon and Other Celestial Bodies" on the explicit condition that the United States Signature and Instrument of Ratification be subject to and include express Declarations consistent with the following principles:
>
> "(a) It is the position of the United States that no provision in this Agreement constrains the existing right of governmental or authorized non-governmental entities to explore and use the resources of the Moon or other celestial body, including the right to develop and use these resources for commercial or other purposes, and no such constraint is accepted by this ratification.
>
> "(b) It is the position of the United States that nothing in this Agreement in any way diminishes or alters the existing right of the United States to determine unilaterally how it shares the benefits derived from development and use by or under the authority of the United Sates of natural resources of the Moon or other celestial bodies.
>
> "(c) Natural resources extracted or used by or under the authority of a State Party to this Agreement are subject to the exclusive control of, and shall be the property of the State Party or other authorized entity responsible for their extraction or use. In this context, it is the position of the United States that Articles XII and XV of this Agreement preserve the existing right of States Parties to retain exclusive jurisdiction and control over their facilities, stations and installations on the Moon and other celestial bodies, and that other States Parties are obligated to avoid interference with normal operations of such facilities.
>
> "(d) Recognition by the United States that the Moon and its natural resources are the common heritage of all mankind is limited to recognition (i) that all States have equal rights to explore and use the Moon and its natural resources, and (ii) that no State or other entity has an exclusive right of ownership over the Moon, over any area of the surface or subsurface of the Moon, or over its natural resources which have not been, or are not actually in the process of being, extracted or used by actual development activities on the Moon.
>
> "(e) It is the position of the United States that

no moratorium on the commercial or other exploration, development and use of the natural resources of the Moon or other celestial body is intended or required by this Agreement. The United States recognizes that, in the development and use of natural resources on the Moon, States Parties to this Agreement are obligated to act in a manner compatible with the provisions of Article VI(2) and the purposes specified in Article XI(7). However, the United States reserves to itself the right and authority to determine the standards for such compatibility unless and until the United States becomes a Party to a future resources regime.

"(f) Acceptance by the United States of the obligation to join in good faith negotiation for creation of a future resources regime in no way constitutes acceptance of any particular provisions or proposed provisions which may be included in an agreement creating and controlling such a regime; nor does it constitute any obligation or commitment to become a Party to such a regime regardless of the contents of any such agreement."

While the ABA's "declarations" do not, in so many words, reject the "common heritage of mankind" principle set forth in the treaty, they certainly would not be in accord with the views of the so-called Group of 77. The relevance of the House of Delegates action on the Moon Treaty to the current negotiations at the United Nations (March 8 to April 30) on the Law of the Sea Treaty is apparent and should strengthen the hand of Ambassador Malone and his team.

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> the disclosure of covert CIA and FBI agents derived solely from unclassified information, violate the first amendment and urge that they be deleted.

Chafee asked whether it was not true that the 100 professors in question were not specifically against the Chafee language, but against the Chafee and Biden language both. In response to this question Biden conceded, "I suspect they are not supportive of that language either. I think the Senator is correct." Chafee picked up on this admission with the statement:

> . . . there is nothing that can be used successfully by the Senator from Delaware to further his case because these professors are against the entire section, and they urge that it be deleted.

The names of other legal scholars were also invoked in the debate on the constitutionality of the language.

A long letter from Robert Bork,[1] professor of law at Yale University, was printed in the *Record*. The letter wound up with the conclusion that "the class of individuals liable under either bill is sufficiently narrow to survive a constitutional challenge."

A letter from Professor Philip B. Kurland of the University of Chicago, responding to a request for his opinion on the constitutionality of 501(c), was quoted by Senator Biden as follows:

> I have little doubt that it is unconsitutional. I cannot see how a law that inhibits the publication, without malicious intent, of information that is in the public domain and previously published can be valid.

Senator Chafee reminded his colleagues that the authority of Professor Antonin Scalia [2] of the University of Chicago had also been invoked in a previous hearing to demonstrate that "the absence of a bad purpose would make the statute unconstitutional." In fact, Senator Chafee pointed out, Professor Scalia's testimony before the House Intelligence Committee last year incorporated the following statement:

> If the character of the information were defined narrowly enough, if the individual against whom the law is directed were defined narrowly enough, I think such a provision might well be sustained.

On the challenge to the constitutionality of the "reason to believe" language, it was pointed out by Senator East (R-N.C.) that there are nine separate federal criminal statutes which make use of the reason to believe standard. These include both the Espionage Act and the Atomic Energy Act. "Moreover," said Senator East, "five federal court cases have upheld the 'reason to believe' language on constitutional grounds for prosecution. The most significant of these cases is that of *Gorin* v. *United States* (312 US 1941) in which the U. S. Supreme Court upheld the reason to believe standard in the Espionage Act of 1917."

Will It Have a Chilling Effect on the Press?

Senators Biden, Bradley, Leahy (D-Vt.) and others repeatedly came back to the argument that the language of the bill would have a chilling effect on the first amendment rights of the press. Just as insistently, Chafee and Jackson and the other proponents of the Chafee amendment responded that the language

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[1] Bork is now a judge in the U. S. Appellate Court in the District of Columbia. He was also, until his appointment, a member of the Standing Committee on Law and National Security.

[2] Professor Scalia is a consultant to the Standing Committee on Law and National Security. However, Professor Scalia testified in his own name rather than on behalf of the committee.

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itself would not prohibit exposés by newspaper men of fraud or wrongdoing by members of the intelligence community or former members of the intelligence community. They said that the entire legislative history of the bill made it clear that this was not the intent of Congress in enacting it. At one point Senator Bradley posed a series of questions expressing this concern, using as concrete examples 10 articles that had been printed in the United States press in recent months. Many of them dealt with cases such as the Wilson and Terpil case which involves former employees of the CIA. In response to the challenges in this group, Senator Chafee pointed out that the bill does not apply to the exposure of *ex-agents*. He quoted from the definition section of the bill—

> The term "covert agent" means an officer or employee of an intelligence agency or a member of the Armed Forces assigned to duty with an intelligence agency.

When he was through, there was not a single case among the 10 articles that Senator Bradley had presented as exhibits where prosecution of the responsible journalist was indicated or would have been justified under the reason to believe language.

The Question of Effectiveness

In the course of the debate the question of constitutionality actually took a back seat to the question of effectiveness. Over and over and over again Biden came back to the argument that the "reason to believe" standard would make for greater difficulties for the Department of Justice than the "intent" standard. He said it would be just as easy for an individual who had been indicted under the Act to deny that he had reason to believe that his action in naming covert United States intelligence agents would impair or impede the intelligence apparatus of the United States as it would be for him to deny that it was his intention to impair or impede. "With the reason to believe standard," Biden said, "we put ourselves in a position that we jeopardize convictions . . . because we are clear, the courts are clear, that the reason to believe standard makes it easier for judges to set aside jury verdicts than with the intent standard. The reason to believe is an objective standard which is generally more reviewable by judges than something subjective like the defendant's intent."

Senator Biden also warned that the reason to believe standard might result in a much more frequent resort to "graymail" (the act of demanding, through discovery procedures, that the government introduce in evidence material that could do grave damage to the national security but which the defense claims is essential to the case).

There were lawyers on both sides of the debate when it came to the question of the difficulty, or ease, of proving intent. Senator Jackson, for example, argued that, from his personal experience as a lawyer and prosecutor, proof of intent was a much more difficult exercise than persuading the court that any reasonable person would have reason to believe that these actions would inevitably lead to certain results. Senator Biden, laying equal claim to experience as a lawyer in criminal trial work, said that his experience led him to the opposite conclusion.

Chafee, Jackson and their colleagues in the debate repeatedly came back to the point that the reason to believe language had been approved and found constitutional by the Carter Justice Department as well as the Reagan Justice Department and that the CIA under both Adm. Stansfield Turner and William J. Casey had expressed a distinct preference for the reason to believe standard because they believed it would be far more effective.

This is where the debate stood at the end of Monday, March 1 (our deadline for publication). That the Intelligence Identities Protection Act will be passed overwhelmingly, there is absolutely no question. Whether it is passed with the Chafee language or the Biden language is something that remains to be seen. If the Chafee language prevails, then the bill will not have to go to conference on the Chafee-Jackson amendment (although it might go on other comparatively minor issues) because it will be identical in the 601(c) section to the bill passed by the House. If the Biden language prevails, however, the bill will have to go to conference on the standard of proof issue and this might significantly delay final enactment.

In our next issue we hope to be able to provide a final account of the adventures of the Intelligence Identities Protection Act in the Senate of the United States. Will it be the Lady (Chafee-Jackson) or the Tiger (Biden)? We'll let you know.

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